Harran Transportation Co., Inc. ***and*** **John Cantidate.** Case 29–CA–17884

October 30, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On March 29, 1995, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions, a brief in support of the judge's decision, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Harran Transportation Co., Inc., West Babylon, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(f).

''(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.''

2. Insert the following as paragraph 2(b), and reletter the subsequent paragraphs accordingly.

''(b) Remove from its files any reference to the unlawful discharge of John Cantidate and notify him in writing that this has been done and that the discharge will not be used against him in any way.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees concerning their membership in or activities on behalf, of the Union.

WE WILL NOT promise our employees unspecified increases in their benefits in order to discourage their membership in, or activities on behalf, of the Union.

WE WILL NOT convey the impression to employees that it would be futile to select the Union as their collective-bargaining representative because we would not bargain in good faith with the Union.

WE WILL NOT threaten our employees with discharge and layoff in order to discourage their membership in, or activities on behalf, of the Union.

WE WILL NOT discharge employees because of their membership in, or activities on behalf, of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer John Cantidate immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privi-

[1] In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by interrogating employees during a meeting in early November 1993, we do not rely on his citation of *Baptist Memorial Hospital System*, 288 NLRB 1160 (1988). In that case, the complaint was dismissed because of a prior settlement. The case is therefore inapposite. We also find that the circumstances surrounding the interrogation were not devoid of elements of coercion. Cf. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Thus, none of the employees asked to attend the meeting were known union supporters at the time of the meeting; the Respondent's operations manager, Andrew Jackson, requested and held the meeting in his office; the nature of the questioning at the meeting was threatening because it conveyed the impression that the information being sought was for the purpose of future reprisals; Jackson did not give these employees any assurances regarding possible retaliation; and the judge's unfair labor practice findings evince an atmosphere of hostility towards union supporters. Taking all these factors into consideration, we find that reasonably tended to restrain, coerce, or interfere with the employees' exercise of their Sec. 7 rights. See *Action Stores*, 298 NLRB 875, 895 (1990).

In excepting to the judge's decision, the Respondent contends that the judge did not have a full and complete record before him. We find no merit in this exception. Moreover, we have not considered documents attached to the Respondent's exceptions, which were not submitted at the hearing, in rendering this decision.

[2] In exceptions, the General Counsel maintains that the judge inadvertently failed to include in his recommended Order an expungement and notification provision regarding Cantidate's discharge. The General Counsel also maintains that the judge erred in failing to include in his notice backpay and expungement language regarding Cantidate's discharge. Accordingly, we find merit to these exceptions and have corrected the Order and notice.

In addition, the judge inadvertently omitted narrow injunctive language from the cease-and-desist portion of his recommended Order. We shall correct this error.

leges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify John Cantidate that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

HARRAN TRANSPORTATION CO., INC.

Saundra B. Rattner, Esq., for the General Counsel.
Murray Portnoy, Esq. (Portnoy, Messinger, Pearl & Associates Inc.), of Westbury, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on November 17, 1994, in Brooklyn, New York.

On December 10, 1993, and February 22, 1994, charges were filed by John Cantidate, an individual (Cantidate) alleging that Harran Transportation Co., Inc. (Respondent) had discharged Cantidate because of his membership in, and activities on behalf of Amalgamated Transit Union, AFL–CIO (the Union), in violation of Section 8(a)(1) and (3) of the Act. On February 28, 1994, a complaint issued alleging a violation of Section 8(a)(1) and (3) consistent with the above charges.

Upon the entire record, including the briefs, and my observation of the demeanor of the witnesses, I make the following findings of fact.

Respondent is a New York corporation with its principal office and place of business located at 30 Mahan Street, West Babylon, New York (West Babylon facility), where it is engaged in the ownership and operation of a bus transportation company. During the past year, which period is representative of its annual operations generally, Respondent derived gross revenues in excess of $250,000 and received at its West Babylon facility products, goods, and materials valued in excess of $50,000 directly from firms located outside the State of New York. Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

The president of Respondent is George Sempke, the vice president is Joseph Fernandez, the operations manager is Andrew Jackson, and Jerry Jarvis is the safety director. All of the above-named individuals are supervisors within the meaning of Section 2(11) of the Act.

Respondent's mechanics have for a period of years prior to 1993 been represented by the Union. Prior to 1993, Respondent's drivers were not represented by any labor organization.

Some time in May 1993 Cantidate met with Union Representative Sonny DiNapali and indicated that the drivers might be interested in union representation. DiNapali gave him a supply of union authorization cards to distribute to interested drivers.

Cantidate was essentially the sole employee union organizer. He distributed authorization cards to most of the drivers and encouraged them to sign. Cantidate signed a union card and obtained signed authorization cards from a majority of Respondent's 200 drivers. Cantidate turned over the signed cards to the Union, and the Union filed a petition for an election. This petition was filed at some date between May 1993 and December 1993.

In November 1993, Operations Manager Jackson held a meeting with Cantidate and two other drivers. Jackson asked the employees how they felt about the Union, and how they could work things out. Cantidate told Jackson he was disappointed with Respondent because their pay and other benefits had been reduced. Jackson asked if the drivers could work it out without the Union and stated things would be better if they could. Cantidate told Jackson that he supported the Union and that he felt the employees would vote for the Union.[1]

Based upon the credible and unrebutted testimony of Cantidate, I find that Respondent, by its supervisor and agent, Jackson, violated Section 8(a)(1) by interrogating its employees concerning their support for the Union. *Southwire Co*., 282 NLRB 916 (1987); *Baptist Memorial Hospital System*, 288 NLRB 1160 (1988).

I also find Respondent, by its supervisor, Jackson, violated Section 8(a)(1) of the Act by promising more lenient treatment and unnamed benefits if they withdraw their support from the Union. *NLRB v. Exchange Parts Co*., 375 U.S. 405 (1964); *Romal Iron Works Corp*., 285 NLRB 1178, 1183 (1987).

Sometime, near the end of November 1993, following his meeting with Jackson Cantidate met with Vice President Fernandez and President Sempke. Fernandez asked Cantidate what he knew about the Union. Cantidate replied the employees needed the Union because they needed more money, and that the Union would be most likely voted in. An NLRB election was scheduled for December 3, 1993. Sempke and Fernandez later told Cantidate that the Union presently represented the mechanics and that notwithstanding such representation, they still hired and fired who they wanted to and they would continue to do so with the drivers. Both Fernandez and Sempke told Cantidate that even if the Union came into the shop to represent the drivers Respondent would do as it wished. Fernandez then reminded Cantidate that Respondent had done him a favor the year before when his license had been suspended by giving him an inside job in the garage.

I find that Respondent, by Fernandez, violated Section 8(a)(1) of the Act by unlawfully interrogating Cantidate. *Southwire*, supra.

[1] Respondent did not call Jackson to rebut Cantidate's testimony, although he was presently employed by Respondent and available to testify. Similarly, as set forth below Respondent did not call President Sempke, or Vice President Fernandez to rebut other testimony, relative to the alleged 8(a)(1) conduct although they were still employed by Respondent, and available to testify. General Counsel in her brief contends an adverse inference should be drawn against Respondent for the failure of these witnesses to testify and rebut Cantidate's testimony set forth above and below. I agree with General Counsel and I draw such adverse inference. *Property Resources Corp*., 285 NLRB 1105 fn. 2 (1987). In any event Cantidate's testimony, which I find credible, is unrebutted.

I also find that by Fernandez and Sempke telling Cantidate that Respondent would hire and fire the employees they wanted to, notwithstanding the Union, Respondent was impliedly threatening to discharge him in violation of Section 8(a)(1) of the Act. *Minnesota Boxed Meat*, 282 NLRB 1208 (1987); *Airport Distributors*, 280 NLRB 1144 (1986).

I further find that by the above statement, and by Fernandez and Sempke further telling Cantidate that bringing in the Union was a waste of money and Respondent would continue to do as it wanted, Respondent violated Section 8(a)(1) of the Act by telling its employees that it would be futile to select the Union as a collective-bargaining representative because Respondent would not bargain in good faith with it. *Jakel, Inc.*, 288 NLRB 730 (1988); *Rood Industries*, 278 NLRB 160 (1986).

I find that by Fernandez reminding Cantidate that when he had lost his driver's license a year ago they had kept him employed in a nondriving job rather than laying him off, given all the unlawful 8(a)(1) conduct described above, is an unlawful threat of possible layoff. *Minnesota Boxed Meat*, supra.

The NLRB election was held on December 3, 1993. A majority of the employees voted for the Union.[2]

On December 5, 1993, Cantidate had a traffic accident. His bus struck a vehicle while stopped at a traffic light. Cantidate testified that it was raining and his bus hydroplaned and he was unable to stop although traveling at a slow speed. There were no personal injuries and the damage to the rear-ended vehicle were fairly light as accidents involving Respondent's buses go.

On December 6, 1993, a Respondent dispatcher notified Cantidate that he could not drive a bus, and that a hearing on the matter was scheduled for December 8, 1993.

On December 8, the meeting took place. Present for Respondent was Jerry Jarvis, safety director, and Andrew Jackson. Cantidate and two drivers representatives were present on behalf of Cantidate. The drivers' representatives were bus drivers and employees within the meaning of Section 2(3) of the Act. The drivers' representatives and Respondent's representatives met without Cantidate. Cantidate was then called into the meeting. Jarvis asked Cantidate if anyone had told him that if a driver has three chargeable accidents during a 3-year period this is cause for discharge.[3] Cantidate had never heard of such a rule. In fact, as set forth in detail below, Respondent has no rules, either oral or written concerning discharge for cause. Discharges were made on a loose, ad hoc basis. Moreover bus accidents were a common occurrence among the drivers. Cantidate argued that while this last accident was his fault, the two prior accidents were not. Jarvis told Cantidate he did not want to hear Cantidate's arguments because he was busy. Cantidate was then told he was terminated. He did not receive a discharge letter. Cantidate was one of the most senior drivers employed by Respondent. One of the top 10 of 200 drivers.

In determining whether an employer discriminates against his employees because of their union activities, General Counsel has the burden of proving that the employees' union activities were a motivating factor in the discrimination alleged. Once such factor is established, the burden shifts to Respondent to establish that such action would have taken place notwithstanding such union activities. *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Wright Line*, 1251 NLRB 1080 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

In the instant case, General Counsel has established a very solid prima facie case.

Cantidate was virtually the sole employee organizer on behalf of the Union. He distributed all the union authorization cards, solicited the employees to sign, collected the signed authorization cards, and returned them to the Union.

Respondent's knowledge and animus toward Cantidate's union activities is clear and undeniable as set forth and described above. Cantidate was interrogated as to his union activities, threatened with discharge and or layoff, and promised lenient treatment and other benefits, because of his union activities.

Moreover, the timing of Cantidate's discharge is suspicious, 1 week after Respondent lost the NLRB election. Although Cantidate did have a bus accident on December 5, 1993, which was admittedly his fault, the accident was minor, and there were no physical injuries. Significantly, Respondent had no rule, oral or written, concerning discharge for cause, or any rule specifically relating to discharge for vehicle accidents. Further, Cantidate was one of the most senior drivers.

Respondent presents shifting reasons for its discharge of Cantidate. At the time of Cantidate's discharge on December 8, Jarvis told him that he was being discharged for three chargeable accidents over a 3-year period. At trial, by which time Respondent must have realized that it had no written or oral rule concerning these chargeable accidents, Respondent broadened its reason for discharge. In this regard Jarvis testified that Cantidate was terminated because he had a generally poor driving record, which included more then three accidents and a total of 10 speeding tickets with increasing speeds each succeeding ticket over his entire employment with Respondent. I conclude such shifting reasons for discharge warrants some inference be drawn against Respondent's allegedly innocent motivation.

Respondent can not sustain a three chargeable accident rule against Cantidate because of the disparate treatment as to other employees. In this connection driver Donelle Becoat was not discharged for his October 30, 1992 accident on Sunrise Highway, in which he rear ended four other cars, resulting in injuries to three people and extensive vehicle damage, and which was his second chargeable accident in 2 years. Driver Robert Little was not discharged for her July 30, 1993 accident when she fell asleep at the wheel of her bus, rear ending another bus and two cars, resulting in extensive vehicle damage. Driver Jackie Williams was not discharged for his third chargeable accident in 3 months in 1993, instead, he was only suspended for 5 days and required to take a defensive driving course before he returned to work. Driver Charlie Brown was not discharged for his third chargeable accident in 10 months in 1991. Driver Edgar Tiques was not discharged for his third chargeable accident on May 27, 1992, in which he rear-ended another car in traffic, and was only discharged when he subsequently lost his drivers license. Driver Dennis Gebert, a short-term employee,

[2] A certification issued on December 28, 1993.

[3] A chargeable accident is an accident in which the Respondent, after an investigation of the facts surrounding the accident, concludes the driver was solely, or in part, responsible for the accident.

was discharged only after his third chargeable accident in 6 months, on September 21, 1993. Driver James Oliver, a short-term employee, was discharged only after his third accident in 9 months, on March 5, 1992. Driver Dion Shore was not discharged for his September 26, 1993 accident in which he left his bus without setting the brake, so that his bus crashed into a hotel, resulting in extensive damage to both the bus and the hotel.

Similarly, Respondent cannot sustain its second defense, Cantidate's overall poor driving record which includes over three chargeable accidents and 10 speeding tickets because it condoned such behavior. In this regard, because of Cantidate's poor driving record described above, Cantidate was terminated by Respondent in January 1992 and reinstated as a driver in June 1992 over the strong written objection by Safety Director Jarvis. From the date of Cantidate's reinstatement until the date of this discharge, December 8, 1993. Cantidate was never informed, orally or in writing that any subsequent chargeable accident, or speeding ticket would result in his discharge. From June 1992, the date of Cantidate's reinstatement until his discharge on December 8, 1993, Cantidate received no speeding tickets, and the only chargeable accident he was involved in was the December 3 accident which was a minor accident.

I conclude that Respondent by its reinstatement of Cantidate on June 1992 condoned his prior poor driving record and that following his union activities, and the NLRB election seized the first and only opportunity to discharge Cantidate for engaging in such activities. I therefore conclude that Respondent has utterly failed to sustain its *Wright Line* burden. I further conclude that Respondent by also discharging Cantidate violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is, and has been at all times material herein, an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees concerning their membership in, or activities on behalf of, the Union, Respondent violated Section 8(a)(1) of the Act.

4. By promising its employees unspecified increases in their benefits in order to discourage its employees membership in, or activities on behalf of, the Union, Respondent has violated Section 8(a)(1) of the Act.

5. By conveying the impression to its employees that it would be futile to select the Union as their collective-bargaining representative because Respondent would not bargain in good faith with the Union, Respondent discouraged its employees membership in, or activities on behalf of, the Union, in violation of Section 8(a)(1) of the Act.

6. By threatening its employees with discharge and layoff in order to discourage their membership in, or activities on behalf of, the Union, Respondent violated Section 8(a)(1) of the Act.

7. By discharging Cantidate because of his membership in, or activities on behalf of the Union, Respondent violated Section 8(a)(1) and (3) of the Act.

THE REMEDY

Since I have found that Respondent discriminatorily discharged John Cantidate I shall recommend Respondent offer Cantidate reinstatement and make him whole for any loss of earnings and other benefits from the date of discharge to the date of proper offer of reinstatement less any net interim earnings in the manner set forth below.

Backpay for the above employee shall be computed in accordance with the formula approved in *F. W. Woolworth Co*., 90 NLRB 289 (1950). Interest on and after January 9, 1990, shall be computed at the ''short-term'' Federal rate for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621 in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1987 amendment to 26 U.S.C. § 6621), shall be computed as set forth in *Florida Steel Corp*., 231 NLRB 651 (1977).

I shall also recommend Respondent expunge from its records any reference to Cantidate's discharge and to inform him that Respondent's unlawful conduct will not be used as a basis for further personnel action concerning him. *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Harran Transportation Co., Inc., West Babylon, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their membership in, or activities on behalf of, the Union.

(b) Promising its employees unspecified increases in their benefits in order to discourage its employees membership in, or activities on behalf of, the Union.

(c) Conveying the impression to employees that it would be futile to select the Union as their collective-bargaining representative because Respondent would not bargain in good faith with the Union.

(d) Threatening its employees with discharge and layoff in order to discourage their membership in, or activities on behalf of, the Union, Respondent violated Section 8(a)(1) of the Act.

(e) Discharging its employee John Cantidate because of his membership in, or activities on behalf of ,the Union.

2. Take the following affirmative action neccessary to effectuate the policies of the Act.

(a) Offer to John Cantidate, full and immediate reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority and or any other rights or privileges previously enjoyed.

(b) Make Cantidate whole for any loss of earnings suffered by him as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amont of backpay due under the terms of this Order.

(d) Post at its West Babylon, New York facility, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 29 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''